1978

Ogden City Corporation v. Bill Joe Parker : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

OGDEN CITY CORPORATION, :

Plaintiff-Respondent, :

vs. : Case No. 15460

BILL JOE PARKER, :

Defendant and Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE CALVIN GOULD PRESIDING

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Defendant-Appellant. :

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BRIEF OF RESPONDENT

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NATURE OF THE CASE

Appellant was convicted of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor contrary to the provisions of Section 14-15-1 of the Revised Ordinances of Ogden City, 1964 Revision.

DISPOSITION IN LOWER COURT

On April 26, 1977, Appellant was convicted in Ogden City Court and sentenced to 180 days in jail. On August 19, 1977, Defendant was convicted in Second District Court and sentenced to 180 days in jail.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the conviction.

STATEMENT OF THE FACTS

On April 2, 1977, at approximately 12:16 P.M., Robert Carpenter, an Ogden City Police Officer, was dispatched to 20th Street and Kiesel Avenue within the corporate limits of Ogden City in response to a complaint that someone had knocked a street sign down and was trying to leave the area (T. 31). Upon his arrival, Officer Carpenter observed a motor vehicle, the front portion of which was lying on top of the street sign stub; the rear portion stuck in mud up to the hubs of the rear wheels (T 25). As he approached, he observed the rear wheels spinning ". . . digging up the lawn . . . quite badly" (T.25). Officer Carpenter observed the Appellant in the driver's portion of the vehicle with his hands upon the steering wheel (T 25). He heard the engine being "revved up" [illegible] and the Appellant shifting the vehicle's gears from "forward" to "reverse" in an effort to rock the vehicle free from the perch on the street sign stub (T.27,30).

Officer Carpenter observed a passenger in the right front seat and another in the rear seat, but testified that only the Appellant could have been operating the accelerator pedal causing the "racing" or "revving" of the vehicle's engine (T.24,29,30). The officer's observations were made standing immediately adjacent to the left front (driver's) door of the vehicle, while looking directly at the Appellant and speaking with him (T.24,25). The police officer noted that vehicle tracks in the fresh snow led from the roadway to the vehicle's resting point and that the damage to the sign was consistent with the damage to the car (T.23).

The police officer testified that the car, because of the sign stub and mud, could not have been moved (T23,24,28,29).

As Appellant responded to Officer Carpenter's request that he turn off the engine and exit the vehicle, Officer Carpenter observed an open bottle of liquor leaning against Appellant's side, which tipped over and spilled on the front seat (T.27). Once out of the car, Appellant lost his balance and had to grab the car door to stand up (T.26). The officer had to "walk"

him to the police vehicle, because " . . . he (Appellant) was unable to walk by himself". Each time Appellant tried to walk alone he lost his balance (T.26). The Appellant was belligerent with the police officer, calling him names (T.26). The police officer testified that without any question Appellant was intoxicated (T.26). Appellant testified that he had had several drinks (T.35) and that he " . . . might have been" under the influence of intoxicants (T.33).

ARGUEMENT

POINT I

APPELLANT WAS UNDER THE INFLUENCE OF INTOXICATING LIQUOR.

While Appellant only addresses the issue of "actual physical control of the vehicle", and in his brief does not contradict the lower court's finding that Appellant was "under the influence of intoxicating liquor", Appellant does not admit that he was, in fact, "under the influence of intoxicating liquor".

The facts which collectively, but easily, lead to the conclusion that Appellant was "under the influence" are: (1) his loss of balance upon exiting the vehicle; (2) his inability to stand unassisted; (3) his inability

to walk; (4) his belligerence with officer; (4) his open bottle of liquor leaning against his side; (5) Appellant's testimony that he had had several drinks and "might have been" under the influence of intoxicants; and (6) the officer's opinion that Appellant was drunk.

The finder-of-fact, Judge Calvin Gould (and earlier Judge David Roth), found beyond a reasonable doubt that Appellant was under the influence of intoxicating liquor.

On appeal, the evidence should be viewed in the light most favorable to this verdict of conviction. State v. Ward, 10 Utah 2d 34, 341 P.2d 865 (1959); State v. Berchtold, 11 Utah 2d 208, 357 P.2d 183 (1960). The finder-of-fact, in this case the district court judge, was in the best position to observe the facial expressions, mannerisms and tone of voice of witnesses and thus was in the best position to weigh the evidence. Such judgments are difficult, if not impossible to make on appeal. By examining the evidence, however, it is obvious that the judge's verdict is heavily supported by the evidence. The verdict will not be overturned on appeal unless it appears that the evidence was so

inconclusive or unsatisfactory that reasonable minds must have entered reasonable doubts that the crime was committed. State v. Sullivan, 6 Utah 2d 110, 307 P.2d 212 (1957); State v. Danks, 19 Utah 2d 162, 350 P.2d 146 (1960). In other words, the strong presumption is that the trial verdict is correct. Appellant, to prevail, has the burden to prove that the verdict was unreasonable, and this he has not attempted whatsoever.

POINT II

DESPITE RELATIVE IMMOBILITY OF APPELLANT'S MOTOR VEHICLE, APPELLANT WAS NEVERTHELESS IN ACTUAL PHYSICAL CONTROL OF HIS MOTOR VEHICLE.

The facts of this case differ substantially from those of the single Utah case, which discusses the concept of "actual physical control". In the Bugger case, 25 Utah 2d 404, 483 P.2d 442, the defendant was found asleep, his car off the main-traveled portion of the roadway, and the engine was not running. The court specifically distinguished this from cases where the engine of the vehicle was operating or the driver was attempting to steer a moving vehicle. Bugger, supra at 443.

Assuming, arguendo, that the police officer was correct in his conclusion that Appellant's car could not be moved, was Appellant in actual physical control through his actions of shifting gears, accelerating the engine, and holding the steering wheel in an attempt to "rock" the car loose? The Bugger case, supra, at 443, seems to require that Appellant control the vehicle or exercise dominion over it. Respondent maintains that Appellant's actions (hands on wheel, gear shifting, and engine acceleration) do constitute control over the vehicle or an exercise of dominion. To buttress this assertion Respondent now refers to other state appellate decisions where the precise issue of actual physical control over immobile vehicles has been decided.

In Gallagher v. Virginia, 205 Va.666, 139 S.E.2d 37 at 38, testimony showed that the defendant was in the driver's seat of the car and accelerating the motor. The car had no traction and it would have been impossible for the car to have moved by itself. The officer stated that when he arrived the wheel was touching the ground, but only with slight traction and it was spinning. The court, in upholding defendant's conviction for operating a motor vehicle while under the influence of intoxicants,

held that manipulating the mechanical or electrical devices of the vehicle constituted operation of the vehicle despite the clear immobility of the vehicle. The court made favorable reference to Flournoy v. Georgia, 106 6a.App. 756, 128 S.E.2d 528; Iowa v. Webb, 202 Iowa 633, 210 N.W. 751; Commonwealth v. Uski, 263 Mass. 22, 160 N.E. 305, Delaware v. Pritchett, 3 Storey 583, 53 Del. 583, 173 A.2d 886; New Jersey v. Ray 4 N.J. Misc. 493, 133 A. 486; New York v. Domagala, 123 Misc. 757, 206 NYS 288; Conneticut v. Swift, 125 Conn. 399, 6A.2d 359; and State v. Sweeney, 77 N.J. Super. 512, 187 A.2d 39.

In Arizona v. Webb, 78 Ariz. 8, 274 p.2d 338 (1954), the defendant was charged with being in actual physical control of a vehicle while under the influence. The Arizona Court, echoing Justice Ellett's opinion in the Bugger case, supra, at 443, stated:

> The conclusion we draw therefrom is that the legislature intended the present law (adding the phrase "being in actual physical control" to the existing "driving" provision) to embrace fact situations not covered by the old, more particularly the legislature intended the law should apply to persons having control of a vehicle while not actually driving it or having it in motion. Webb, supra, at 339. (Emphasis supplied.)

In State v. Overbay, 206 N.W. 634, defendant drunkenly slides his car into a ditch. The Sheriff found the defendant "at the wheel operating the engine, and defendant and friend behind the car pushing the same; in a joint effort to get the car out of the ditch." The court observed, "For the purpose of a conviction, it must be said that the operation of the engine in the attempt to get the car back on the road was a violation of the statute, even though it be true that he had not operated the car prior to the accident." (Emphasis supplied.)

In People v. Domagala, 123 Misc. 757, 206 NYS 288, the defendant was also attempting the impossible. He had tried six times to drive up over a curb, but because the front wheels were squarely against the curb, and the car lacked sufficient power, the effort was futile; each attempt resulted in a stalled engine. The court expressly rejected the notion that the law was not violated until the car moved; and held that the defendant "began to violate the law the instant he began to manipulate the machinery of the motor for the purpose of putting the automobile into motion."

In State v. Storrs, 163 A. 560, the Supreme Court of Vermont, the vehicle's motor could not be started although the "self-starter" was operational. The court held that "the turning of the ignition switch and the effect of this upon the self-starter was an operation of the car . . ."

In Carter v. Texas, 353 S.W.2d 458, the court found that evidence that defendant was seated behind the steering wheel attempting to drive it from the flooded ditch and that tire and skid marks led from the broken barricade on the highway to the automobile, was sufficent to show that defendant drove the automobile as alleged upon a public highway while intoxicated.

In Roberts v. Maine, 29 A2d 457, the Court addressed this issue:

> Is one who sits behind the steering wheel of an automobile with the motor running and the car in gear and the rear wheels spinning and swerving slightly from side to side, while the front end of the motor vehicle is suspended in the air five or six inches so that the turning of the steering wheel cannot control the direction or course of the motor vehicle and the front end of the motor vehicle chained to the

> rear of a truck ahead being towed by the vehicle ahead, guilty of operating a motor vehicle under this statute?

The court answered affirmatively by endorsing the disputed instruction to the jury:

> . . . if you believe that (the defendant) was behind the wheel and put the motor in motion, had placed the car in gear, that the rear wheels, because of the motor being in motion, were whizzing, or something, and that the rear of that car swayed sideways (then you shall find that defendant) . . . was operating that car." (Parenthetical phrase mine.)

In Commonwealth v. Clarke, 150 N.E. 829, the Massachusetts Court held that the defendant by manipulating the gears of a vehicle (with the engine off), which permitted it to move forward by its own weight and strike another vehicle, was guilty of operating a motor vehicle while intoxicated. This case is dissimilar in that the defendant's engine was not running, as was Appellant's engine in our case. However, the striking similarity is the natural effect of gravity. Whereas, the Massachusetts' defendant's car went three or four feet down hill at the command of gravity, our

Appellant's car mired itself in the mud with the help of gravity and spinning rear wheels.

In contradiction of all of the above cases is a single 1929 Pennsylvania case where defendant tried to operate a vehicle with a broken drive shaft. Commonwealth v. Fox, 17 DC 491 (Penn. 1929). The court found that because the shaft was broken there was not the requisite control, but the Court noted:

> This is a very close case, and as the rule of law is that the benefit of the doubt should always be given to the defendant, we feel that . . . it is doubtful if the defendant was the operator of the car within the meaning of the statute.

But the court did order the defendant to pay the costs in the case.

Although the issue of operating an immobile (or rocking) vehicle has not yet been decided in Utah, it is clear that where other states (except Pennsylvania) have confronted the issue, they have found the defendant to have been operating or in actual physical control of the vehicle even though the vehicle could not be moved.

Respondent also believes that it is important to remember that the uncontradicted testimony is that property damage did occur as the extrication attempt was being made; "It was digging up the lawn . . . quite badly." (T.25). And even though the rocking may not have produced perceptible movement forward or backwards, the car obviously went downwards.

POINT III

THE ACCEPTANCE OF THE DEFENSE OF IMPOSSIBILITY (OR IMMOBILITY) WOULD BE AN EFFRONT TO REASON, REHABILITATION AND JUSTICE.

There is no reasonable doubt that Appellant was intoxicated; there is further no doubt that he was exerting his best efforts to move his vehicle. To absolve him from responsibility solely because his wheels were mired would be wrong.

In the A.L.I. Model Penal Code, Tenative Draft No. 10 (1960), under Article 5, Inchoate Crimes, the A.L.I. noted:

> . . . conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity,

> not alone on this occasion, but on others. There is a need wherefore, subject again to proper safeguards, for a legal basis upon which the special danger that such individuals present may be assessed and dealt with. They must be made amenable to the corrective process that the law provides . . . . . Finally, and quite apart from these considerations of prevention when the actor's failure to commit the substantive offense, as when the bullet misses in attempted murder or when the expected response of solicitation is withheld (or when the drunk driver's wheels are stuck), his exculpation on that ground would shock the common sense of justice. Such a situation is unthinkable in any mature system, designed to serve the proper goals of penal law . . . (at P.25, A.L.I. Model Penal Code, Tenative Draft No. 10; parenthetical expression mine.)

CONCLUSION

The very idea that Appellant should escape the fair, just, and, hopefully, educational consequences of his act, because his tires were stuck, has been rejected in every forum, where it has been considered, but one. If movement alone is the factor upon which this case is

to be decided (to the exclusion of all other operational acts by Appellant), the Court will find itself deciding how many inches or feet up, down, sidewards, forwards, or backwards constitutes "movement". A much more reasonable standard would proceed from the finding that defendant was intoxicated (or "under the influence") and that he did everything he could physically do with his vehicle to move it, and that his failure to move the vehicle, except deeper into the earth, did constitute "actual physical control". The City and District Courts' decisions should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing brief to George B. Handy, Attorney for Defendant-Appellant, postage pre-paid, 2650 Washington Boulevard, Suite 102, Ogden, Utah 84401, this 10th day of January, 1978.

Debbie Creager

Debbie Creager - Secretary